STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 14, 2009
v	No. 280547 Berrien Circuit Court
JULIUS RICARDO DAVIS, Defendant-Appellant.	LC No. 2007-400889-FC

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawful imprisonment, MCL 750.349b, unlawful use of a motor vehicle, MCL 750.414, and domestic assault, MCL 750.81(2). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to a prison term of 120 to 270 months for the unlawful imprisonment conviction and to jail terms of 121 days for the unlawful use of motor vehicle conviction and 93 days for the domestic assault conviction. Defendant appeals as of right. Because we conclude that there was no substitution of counsel, that the trial court did not abuse its discretion in admitting evidence of defendant's prior assaults of the victim, that there was no instructional error regarding the jury's use of the other acts evidence, that defendant's conviction for unlawful imprisonment is supported by sufficient evidence, and that there were no sentencing errors, we affirm.

I. Substitution of Counsel

Defendant argues that the trial court abused its discretion when it permitted without cause and without defendant's consent the substitution of trial counsel. We disagree because the record does not establish that a substitution of counsel ever occurred.

MCR 6.005(H)(1) states that the responsibilities of a trial lawyer appointed to represent a defendant include "representing the defendant in all trial court proceedings through initial sentencing." MCR 2.117(B)(3), governing the appearance of law firms, provides:

> (a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. . . . That attorney's appearance continues until an order of substitution or withdrawal is entered. This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) The appearance of an attorney is deemed to be the appearance of every member of the law firm. . . .

In this case, the trial court appointed Felony Defense Counsel located at 606 Main Street in St. Joseph to represent defendant. Thus, according to MCR 6.005(H)(1), Felony Defense Counsel had the responsibility to represent defendant in all trial court proceedings through initial sentencing. And, any attorney who was a member of Felony Defense Counsel could appear to represent defendant. MCR 2.117(B)(3)(b). The first attorney to appear to represent defendant was Richard Sammis, who the trial court identified as a member of Felony Defense Counsel. The facts suggest that the second attorney to appear to represent defendant, Gary Campbell, was also a member of Felony Defense Counsel. He had the same address, at least until the time of sentencing, and worked with Sammis on defendant's case. There was no withdrawal or substitution of Felony Defense Counsel after the initial appointment, and neither defendant nor the trial court questioned the appearances of either Sammis or Campbell at any time before this appeal.

In *People v Davis*, 277 Mich App 676, 679-680; 747 NW2d 555 (2008), vacated in part on other grounds 482 Mich 978 (2008), the defendant sought resentencing because his trial counsel did not appear at sentencing. Instead, another attorney associated with trial counsel's firm represented defendant. The defendant did not waive trial counsel's representation, he did not openly consent to being represented by substitute counsel, and the trial court did not specially appoint the attorney to represent him at sentencing. However, this Court held, in part, that because the attorney was (1) associated with trial counsel, (2) was a member of trial counsel's firm, (3) was familiar with defendant's case, and (4) defendant never objected to representation by "substitute" counsel, defendant was not entitled to a vacation of his sentence absent any facts suggesting that manifest injustice arose from the "substitution" of counsel. *Id.* at 679-680. Here, defendant did not waive representation by Sammis, he did not openly consent to representation by Campbell, and the trial court did not specially appoint Campbell. However, Campbell was associated with Sammis, they were both part of Felony Defense Counsel, and Campbell was familiar with defendant's case and worked with Sammis on it. Thus, we hold, on the facts of this case, that because defendant did not object to representation by Campbell, he cannot now seek relief on this basis. Defendant has failed to prove that a substitution of counsel occurred.[1]

II. Other Acts Evidence

Defendant argues that the trial court erred when it admitted, pursuant to MRE 404(b), evidence of his two other assaults of the victim. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203

[1] In addition, we reject defendant's claim that he was prejudiced by Campbell's alleged "lack of adequate preparation." First, the record establishes that Campbell did impeach the victim with prior inconsistent statements. Second, there is no indication on the record, and defendant has not established by an offer of proof, that any favorable expert testimony was available to him, that the victim's son could have provided any testimony beneficial to his behalf, or that evidence of other acts by the victim was admissible to establish a motive by the victim to fabricate her testimony.

(2003). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"Before other-acts evidence may be introduced, the prosecution must satisfy a three-part test: (a) there must be a reason for its admission other than to show character or propensity, (b) it must be relevant, and (c) the danger of undue prejudice cannot substantially outweigh its probative value." *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). The trial court held that evidence of the two prior assaults was admissible to prove that defendant acted in accordance with a common plan or scheme, which is a proper purpose for the admission of other acts evidence, MRE 404(b).

"[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Distinctive and unusual features are not required. *Id.* at 66. Here, during the charged and uncharged acts, defendant became extremely upset when he believed that the victim was cheating on him. He yelled at the victim and physically assaulted her. Accordingly, the charged and uncharged acts contain common features beyond mere assaults, from which one could infer that defendant had a system that involved assaulting the victim when he believed that she was not being faithful to him. Because the evidence of the prior assaults provided an inference that defendant acted in accordance with a common scheme, the evidence was relevant to show that the charged acts occurred. *Id.* at 63.

Further, the trial court properly exercised its discretion in deciding that the highly probative value of the evidence of the prior assaults was not substantially outweighed by unfair prejudice, MRE 403. "All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *McGhee, supra* at 613-614. Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury by injecting considerations extraneous to the merits of the lawsuit such as the jury's bias, sympathy, anger, or shock. *Id.* at 614. The evidence of defendant's two prior assaults was highly probative because it was relevant to the ultimate issue at trial, whether defendant committed the charged acts, and the evidence of the assaults did not inject considerations extraneous to the merits of the lawsuit, as the two prior assaults were substantially similar to the charged act.

Defendant also argues that the trial court erred in when it failed to instruct the jury that it could only consider the evidence of the two prior assaults for a limited purpose. We disagree. The record establishes that, sometime after the trial court admitted the evidence of the two prior assaults under MRE 404(b), the court and counsel reviewed MCL 768.27b,[2] and all agreed that

[2] MCL 768.27b(1) provides:

> Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any

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the jury would be instructed in accordance with CJI2d 5.8c. Consequently, the trial court instructed the jury that it could consider the evidence of the two prior assaults "in deciding if the defendant committed the offenses for which he is now on trial." Because defendant deemed the instruction proper, he cannot argue on appeal that the trial court erred in giving the instruction. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

III. Sufficiency of the Evidence

Defendant claims that there was insufficient evidence to support his conviction for unlawful imprisonment. Specifically, defendant argues that the evidence was insufficient to prove that he knowingly restrained the victim under any of the three circumstances listed in MCL 750.349b(1).[3] We disagree.

When reviewing a challenge to the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether a reasonable trier of fact could find that all of the elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "[C]ircumstantial evidence and reasonable inferences arising from th[e] evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

MCL 750.349b(1) provides:

> A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
>
> (a) The person is restrained by means of a weapon or dangerous instrument.
>
> (b) The restrained person was secretly confined.
>
> (c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

The phrase "secretly confine" means either "[t]o keep the confinement of the restrained person a secret" or "[t]o keep the location of the restrained person a secret." MCL 750.349b(3)(b). The "essence of 'secret confinement' . . . is deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994). Here, sometime around midnight, defendant took the victim's cellular telephone. He then forced the victim into her vehicle, and drove the victim around, stopping at dark, isolated areas to assault her. When the victim attempted to escape at

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> purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

[3] Defendant does not argue that the evidence was insufficient to prove that the knowingly restrained the victim.

the first stop, defendant caught her and forced her to return to the vehicle by grabbing her hair. At the gas station, defendant told the victim that, if she stepped out of the vehicle, he would drive to Stevensville, where the victim's son was sleeping. This evidence, viewed in the light most favorable to the prosecution, shows an intention by defendant to keep his confinement of the victim a secret. The evidence was sufficient to prove that the victim was secretly confined.

IV. Offense Variables 4 and 10

Defendant claims that the trial court erred in scoring offense variables 4 and 10 at ten points each. We disagree. We will uphold a trial court's scoring of an offense variable (OV) if there is any evidence to support the scoring. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

OV 4 may be scored at ten points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). "There is no requirement that the victim actually receive psychological treatment." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Defendant, during his confinement of the victim, threatened to beat, torture, and kill the victim. Defendant also implied that he would hurt her son if she tried to escape. After the victim escaped from defendant, she was scared, crying, very upset, and in shock. The victim reported that "she has scary visions of the events that took place that night" and that "there are times when she just breaks down crying." This evidence is sufficient to support the trial court's scoring of OV 4. See *People v Drohan*, 264 Mich App 77, 90; 689 NW2d 750 (2004), aff'd 475 Mich 140 (2006).

OV 10 may be scored at ten points if "[t]he offender exploited . . . a domestic relationship." MCL 777.40(1)(b). Defendant claims that the trial court erred in scoring ten points for OV 10 because he and the victim were not a "family" and, therefore, they were not in a domestic relationship. MCL 777.40 does not define the phrase "domestic relationship." However, a person is guilty of domestic assault if the person assaults "his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household." MCL 750.81(2); see also MCL 768.27b(5)(b). We conclude that the Legislature intended the phrase "domestic relationship," as used in MCL 777.40, to include those relationships listed in MCL 750.81(2). See *Brown v Mayor of Detroit*, 478 Mich 589, 593; 734 NW2d 514 (2007) ("The primary goal of statutory interpretation is to give effect to the intent of the Legislature."); see also MCL 8.3a (where undefined terms in a statute have developed peculiar legal meanings, those meanings should be attributed to them).

A "dating relationship" is defined as "frequent, intimate associations primarily characterized by the expectation of affectional involvement." MCL 750.81(6). Here, defendant and the victim had been spending time with each other for almost a year and a half. They engaged in consensual sexual relations. Defendant often spent the night at the victim's apartment, and he kept personal belongings there. In addition, defendant spent time with the victim's family, he took care of the victim's son when the victim was away, and the victim spent time with defendant's family. The trial court's finding that defendant and the victim were in a domestic relationship is supported by sufficient evidence.

We reject defendant's argument that the trial court's scoring of OV 4 and OV 10 violated his Sixth Amendment right to jury, as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has definitely held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. See, e.g., *People v McCuller*, 479 Mich 672; 739 NW2d 563 (2007).

V. Remaining Sentencing Issues

Defendant makes numerous other challenges to his sentence of 120 to 270 months' imprisonment for the unlawful imprisonment conviction. All are without merit.

MCL 769.34(10) provides that if a defendant's "minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Defendant does not dispute that his minimum sentence of 120 months' imprisonment falls within the recommended minimum sentence range under the legislative guidelines, as enhanced by MCL 769.10.

Defendant claims that his sentence was based on inaccurate information because the trial court, contrary to MCR 6.425(A)(5), failed to assess his rehabilitative potential through intensive alcohol, drug, and psychiatric treatment. Contrary to defendant's argument, MCR 6.425(A)(5) only requires a probation officer to include a defendant's "medical history, substance abuse history, if any, and, if indicated, a current psychological report or psychiatric report" in the presentence report. The presentence report contains a summary of defendant's reported history of alcohol and substance abuse. Defendant does not challenge the accuracy of the presentence report. A presentence report is presumed to be accurate, and a trial court may rely on the report unless effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Accordingly, defendant's argument that the trial court relied on inaccurate information in sentencing him is without merit. Because the trial court did not rely on inaccurate information, nor was there an error in the scoring of the guidelines, see Issue IV, *supra*, we are required to affirm defendant's minimum sentence, MCL 769.34(10), absent a sentencing error of constitutional magnitude. See *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

Defendant claims that his sentence constitutes cruel and unusual punishment. However, a minimum sentencing falling within the legislative guidelines is presumed proportional, *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995), and a proportional sentence does not constitute cruel or unusual punishment, *Drohan*, *supra* at 92. In imposing sentence, the trial court stated that "significant punishment [was] appropriate" because of defendant's actions. He held the victim captive, where he "beat" and "terrorized" her, "impos[ing] physical and mental scars that [were] gonna last a very long time." The trial court also noted that defendant had previously served a "full 10 years" for a conviction of assault with intent to commit great bodily harm, which showed his inability to be "compliant."[4] Defendant has failed to present evidence

[4] Based on these statements by the trial court, along with the court's statement that the purpose of the imposed sentence was "punishment, protection of the community, deterrence, reformation[,] and restitution," we find no merit to defendant's argument that the trial court failed to articulate
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to overcome the presumption of proportionality regarding his minimum sentence, nor has he presented any argument to convince us that his maximum sentence may not be proportional. We affirm defendant's sentence of 120 to 270 months' imprisonment.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

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its reasons for the imposed sentence.